associated with drugs there is no need for him to exercise his powers under s 5(3). In this case the inquiry officer was satisfied by the consideration of the report. He has duly discharged his function.

Mala fides

The applicant alleged mala fides on the part of the police officer Zakaria. I found no mala fides established against the officer. Further, to render the detention order invalid, what has to be made out is not mala fides on the part of a police officer but mala fides on the part of the detaining authority, ie the Minister. In *Yeap Hock Seng alias Ah Seng* v *Minister of Home Affairs, Malaysia*[2] Abdoolcader J (as he then was) said:

> But where an order of detention is challenged on the ground of *mala fides*, what has got to be made out is not the want of *bona fides* on the part of the police, but the want of *bona fides* as well as the non-application of mind on the part of the detaining authority which for this purpose must be taken to be different from the police.

There is no allegation of mala fides on the part of the Minister and there is no such evidence.

Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1988 (Act A707) is unconstitutional

This point had already been raised in *Lim Kit Siang* v *Menteri Dalam Negeri & Ors.*[3] In this case the learned judge (Mohamed Dzaiddin J) held that the Internal Security (Amendment) Act 1988 (Act A705) was constitutional. The Dangerous Drugs (Special Preventive Measures) Act 1985 and the Amendment Act (1988) (Act A707) were also enacted pursuant to art 149 of the Federal Constitution. I agree with the decision of the learned judge and hold that the Act A707 is constitutional.

Article 151(3) of the Federal Constitution does not apply

It was contended that the Minister ought to disclose all facts upon which the Minister's decision was made as art 151(3) did not protect the non-disclosure. It was argued that this was so because the detention under s 6(1) of the Act was only 'in the interest of *public order*' whereas the protection under art 151(3) was in respect of facts 'whose disclosure would in its opinion be against *the national interest*'. (emphasis added)

It was further contended that there is a distinction between a detention under the Act and a detention under s 8 of the Internal Security Act 1960. Whereas the detention under the Internal Security Act is in the interest of national security the detention under the Act is only in the interest of public order. Therefore art 151(3) does not apply to a detention under the Act as it does to a detention under the Internal Security Act (see *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police* v *Tan Sri Raja Khalid bin Raja Harun*[4]).

I do not agree with the contention. Section 14 of the Act protects against the disclosure of facts which are against the national interest. Similar provision is contained in s 16 of the Internal Security Act. The provisions of the two sections merely restate the provision of art 151(3). When it comes to disclosure of facts the test is 'national interest'. In my view there is no distinction between the detention under the Act and detention under the Internal Security Act in this respect. Though the detention under the Act is only in the interest of public order, when it comes to disclosure of facts the test is the same and that is, whether the disclosure is against the national interest.

I find that the applicant has failed to show that the detention is unlawful. I therefore dismissed the application.

Application dismissed.

Solicitors: *Ngeow & Maurice Gomes.*

Reported by *Yap Shao Sin*

Dominic Daung Ak Saba v Mohamad Hamden bin Dollah & Ors

HIGH COURT (KUCHING) – CIVIL APPEAL NO KG 4 OF 1988
HAIDAR J
25 MARCH 1989

Land Law – Title issued to first respondent by Settlement Officer – Appellant's appeal against this before First Class Magistrate dismissed – Whether First Class Magistrate had jurisdiction to hear appeal – Land Code (Cap 81), ss 2, 5, 18, 84, 85, 88, 91, 93, 94, 95, 96 & 102

The appellant brought an appeal before the First Class Magistrate against the decision of the Settlement Officer to issue title of land under s 18 of the Land Code (Cap 81) ('the Code') to the first respondent. At the hearing of the appeal before the First Class Magistrate, counsel for the first respondent raised two preliminary objections, viz (a) that the court of the Magistrate of the First Class was not the proper forum or venue for the appeal to be adjudicated under the Code as the appellant's rights, if any, were contractual in nature and not under native customary rights which could be settled under the Code; and (b) that the land forming the subject matter of the appeal was not the same land as that claimed by the appellant.

The First Class Magistrate ruled in favour of the first respondent on ground (a) alone and dismissed the appeal purportedly for lack of jurisdiction with costs to be taxed and was of the view that ground (a) alone was sufficient for him to dismiss the appeal.

Held, dismissing the appellant's appeal:

(1) There are two parts to s 102 of the Code, pursuant to which any person aggrieved by any act or decision of the

Settlement Officer or the Superintendent may appeal to the court of a Magistrate of the First Class, viz (i) the exercise of the power conferred by s 18 of the Code by the Settlement Officer or the Superintendent; or (ii) the claim investigated by the Settlement Officer in accordance with the provisions of sub-s (2) of s 91 of the Code.

(2) Clearly the appeal by the appellant was against the decision of the Settlement Officer contained in the Settlement Order vide Sarawak Government Gazette No 976 dated 18 March 1982 and would appear to come within the first part of s 102.

(3) Section 94(1) of the Code provides for the Settlement Officer to investigate publicly all claims to state land, whether based upon documentary evidence, native customary tenure or otherwise and he shall have the power to determine in whose favour the rights to such land shall be shown in the Settlement Order.

(4) 'State land' under s 93(1) of the Code includes native customary land.

(5) The necessary notifications, including an announcement through Radio Malaysia Sarawak, were made inviting claimants to present their claims in the exercise to be carried out by the Land and Survey Department.

(6) The appellant did not present his claim as provided under s 93(2) of the Code. Notwithstanding the appellant's contention that he was misled by the second respondent to believe that when the land title shall have been duly issued by the Land and Survey Department, the appellant's share under and by virtue of the agreement would be duly transferred to him by the second respondent, the appellant's failure to exercise his statutory rights was brought about by his own fault and such failure clearly extinguished his rights to any claim under the Code. The appellant could not then try to invoke s 102 of the Code by bringing the matter by way of an appeal to the court of a Magistrate of the First Class.

(7) The appeal was therefore not properly brought before the court of a Magistrate of the First Class and the learned Magistrate should have struck out the appeal and it was really not an issue of want of jurisdiction as decided by her.

(8) It was unnecessary to determine on the second objection raised by the advocate to the first respondent.

Legislation referred to

Land Code (Cap 81) ss 2, 5, 18, 84, 85, 88, 91, 93, 94, 95, 96, 102
Subordinate Court Rules 1980 O 8 r 6(2)
Sarawak Government Gazette No 976

June Chan for the appellant.
Cheng Hui Hong for the first respondent.

Cur Adv Vult

Haidar J: This is an appeal pursuant to s 102 of the Land Code (Cap 81) ('the Code') in respect of the decision of the learned First Class Magistrate dismissing the appeal of the appellant, Dominic Daung Ak Saba alias Dominic D Anak Daung Sabah, against the decision of the Settlement Officer to issue title under s 18 of the Code of the land situated at Serian Town containing an area of 4.28 acres, more or less, and described as Lot 666 Serian Town District to Mohamed Hamden bin Dollah, the first respondent.

At the hearing of the appeal before the learned First Class Magistrate, learned counsel then for the first respondent raised a preliminary objection that the appeal was filed out of time but subsequently abandoned his preliminary objection. Encik Jamaluddin, acting for the third respondent, the Superintendent, applied for the Superintendent to be struck out as he should not have been made a party to the proceeding, relying on O 8 r 6(2) of the Subordinate Courts Rules 1980. The learned First Class Magistrate, after hearing the submission, made an order that the name of the Superintendent be struck out. When this appeal came before me, Mr Clifford Ang appeared for the Superintendent, the third respondent; apparently a notice of the hearing of this appeal must have been served on the third respondent. Mr Clifford Ang informed the court that the third respondent had been struck out as a party by the learned First Class Magistrate in the appeal before her and there has been no appeal against the said order and hence sought the direction of the court. As there has been no appeal, I am of the view therefore that the presence of Mr Clifford Ang in this appeal is really unnecessary and released his attendance.

At the hearing of the appeal before the learned First Class Magistrate, learned counsel for the first respondent raised preliminary objections on two grounds, namely:

(a) The court of the Magistrate of the First Class is not the proper forum or venue for the appeal to be adjudicated under the Code as the appellant's rights, if any, are contractual in nature and not under native customary rights which could be settled under the Code.

(b) The subject matter, lot 245, Serian Town Land District which is now lot 666, Serian Town Land District, is not the same land that the appellant is claiming which is described as lot 245, Bukar-Sadong Land District.

The learned First Class Magistrate ruled in favour of the first respondent on ground (a) alone and dismissed the appeal with costs to be taxed purportedly for lack of jurisdiction. She was of the view that ground (a) alone is sufficient for her to dismiss the appeal without the necessity of determining ground (b).

In order to determine the issue of jurisdiction of the learned First Class Magistrate to hear the appeal under s 102 of the Code we have to examine closely the provisions of s 102(1) of the Code. Section 102(1) reads:

> 102(1) Any person aggrieved by any act or decision or the Settlement Officer, or by any decision of the Superintendent to exercise or refrain from exercising the power conferred by s 18, may, notwithstanding anything to the contrary in s 7

of the Subordinate Courts Ordinance contained, appeal to the court of a Magistrate of the First Class by a petition in writing made within three months from the date of the publication in the Gazette of the Settlement Order containing the decision which is the subject of appeal or, in the case of a decision arising out of a claim investigated by the Settlement Officer in accordance with the provisions of sub-s (2) of s 91, within three months from the date on which a copy of such decision was served on the person so aggrieved, and, for the purpose of any further appeal, any such decision made by a Settlement Officer or the Superintendent as is mentioned in this section shall be deemed to have been made in civil proceedings.

It seems to me that there are two parts to s 102(1) of the Code, namely:

(i) the exercise of the power conferred by s 18 of the Code by the Settlement Officer or the Superintendent; or
(ii) the claim investigated by the Settlement Officer in accordance with the provisions of sub-s (2) of s 91 of the Code.

Clearly the appeal by the appellant is against the decision of the Settlement Officer contained in the Settlement Order vide Sarawak Government Gazette No 976 dated 18 March 1982 (see pp 1 and (a)44 of the appeal record) and would appear to come within (i) above. A settlement order is made pursuant to s 95(1) of the Code and it is accordingly gazetted under s 95(2) of the Code. Sections 93 to 96 come under the title 'Settlement of State Lands' in the Code. Section 93(1) provides for all claimants to state land in the block to appear at such time and place as the Settlement Officer may, by notice under s 88, direct. Section 93(2) provides that claimants may appear in person, or by advocate, or by any representative approved by the Settlement Officer and shall produce to the Settlement Officer all documents held by them or under their control, affecting the state land. It is also provided that a claimant who fails to appear may submit to the Settlement Officer a statement of his claim in writing. Section 94(1) provides for the Settlement Officer to investigate publicly all claims to state land, whether based upon documentary evidence, native customary tenure or otherwise and he shall have the power to determine in whose favour the rights to such land shall be shown in the settlement order made under s 95 or may, in the case of conflicting claims, permit the parties to refer the determination of the same to arbitration under the Arbitration Ordinance.

'State land' is defined under s 2 of the Code to mean 'all land for which no document of title has been issued ...' 'Native customary land' is defined under s 2 of the Code as 'land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the first day of January 1958, and shall subsist as such'.

Section 5(2) of the Code provides the methods by which native customary rights may be acquired. However, there is a proviso to sub-s (2) of s 5 which states:

> until a document of title has been issued in respect thereof, such land shall continue to be state land and any native lawfully in occupation thereof shall be deemed *to hold by licence* from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him;
> (emphasis added)

It would appear that 'State land' under s 93(1) of the Code includes native customary land and under s 94(1) the Settlement Officer shall investigate publicly all claims to state land 'whether based upon documentary evidence, native customary tenure or otherwise' and is given power thereunder to the Settlement Officer to determine in whose favour the rights to such land be shown in the settlement order made under s 95 and is further given the power in the case of conflicting claims to permit the parties to refer the determination of the same to arbitration under the Arbitration Ordinance. Section 94(2), in so far as the facts of this appeal are concerned, is not relevant for consideration.

As can be seen from the appeal record, the necessary actions were taken as required under ss 84, 85 and 88 of the Code (see pp (a)33, (a)36 and (a)41). It is thus clear that the necessary notifications including an announcement through Radio Malaysia Sarawak (see pp (a)39 and (a)40) were made inviting claimants to present their claims in the exercise to be carried out by the Land and Survey Department. It is not disputed that the appellant did not present his claim as provided under s 93(2) of the Code as can be seen at para 6 of p 2 of the appeal record wherein the appellant was led to believe by the second respondent that when the land title shall have been duly issued by the Land and Survey Department, the appellant's share under and by virtue of the agreement will be duly transferred to him by the second respondent.

The settlements of state lands carried out by the Settlement Officer, as I said earlier, could include native customary lands and under s 94(1) the Settlement Officer is empowered to determine in whose favour the rights to such lands are to be shown in the Settlement Order made under s 95. The first respondent, it would appear, took the action as prescribed by the provisions of the Code, by presenting his claim to the Settlement Officer (see p (a)9 of the appeal record). The second respondent, in response to the notifications issued, also put up his claim under the native customary rights (see pp (a)4 and (a)5 of the appeal record). The Settlement Officer in his investigation under s 94(1) got the confirmation from the second respondent about the purchase of the land in question by the first respondent and the second respondent consented to surrender all his claims over the land to

the first respondent and in fact the second respondent requested for the issue of the title to the first respondent (see p (a)10 of the appeal record) and consequently the Settlement Officer did make such an order as per the settlement order which was gazetted subsequently under s 95(2) (see p (a)44 of the appeal record). On the issue that no document of title has been issued as yet, to my mind, it has no substance as it is a matter of time that the issue document of title will be given to the first respondent as decided by the Settlement Officer as per the settlement order.

As regards the contention of the appellant that he was misled by the second respondent for not putting up his claim under the settlement of state lands scheme, I regret to say that it was brought about by his own fault for not exercising his statutory rights as s 93(2) of the Code clearly allows him to appear in person or by an advocate or by any representative approved by the Settlement Officer and produce all documents held by him or under his control affecting the state land claimed by him. Even if he has not presented his claim under the provision of s 93(1), the Code allows him under s 94(3) to assert his claim provided the settlement order has not been published under s 95 and the Settlement Officer is satisfied that he is entitled to any right to the land as if he had presented a claim within the time prescribed. However, once a settlement order has been made and published accordingly in the gazette the Settlement Officer can only, by notice in the Gazette, correct any clerical errors and may make clerical amendments or additions to the settlement order, as may be necessary to give effect to his decision and no more.

With respect, I do not think that it can be strenuously argued that the word 'any person' in s 102(1) of the Code can wholesale include the appellant unless he files his claim to the Settlement Officer in accordance with the provisions of the Code and only then can he be said to have been aggrieved by any act or decision of the Settlement Officer and invoke his legal right under s 102 of the Code accordingly. In my opinion, by failure of the appellant to exercise his statutory rights in accordance with the provisions laid down in the Code he has clearly by his action extinguished his rights to claim under the Code and cannot now try to invoke s 102 of the Code by bringing the matter by way of an appeal to the court of a Magistrate of the First Class. In other words I am of the view that the appeal has not been properly brought before the court of a Magistrate of the First Class and the learned magistrate should have struck out the appeal and it is really not an issue of want of jurisdiction as decided by her. In the circumstances I would strike out the appeal with costs to the first respondent.

If at all there is a breach of the agreement by the second respondent, it is open to the appellant to assert his contractual rights elsewhere and not by way of an appeal under s 102 of the Code. In view of my judgment I find that it is unnecessary for me to determine on the second issue raised by the advocate for the first respondent on whether the subject matter of the land is the same one or otherwise. In any event it would appear from the letter of the Pengarah Tanah dan Ukur, Bahagian Pertama (see p (a)31 of the appeal record) that the subject land is the same and, it would appear, was wrongly described by the advocate for the appellant vide their letter dated 22 December 1981.

Appeal dismissed.

Solicitors: *Satem, Sagah & Chai; Cheng & Cheng.*

Reported by *Yap Shao Sin*

Dunia Muzik WEA Sdn Bhd & Anor v Koh Tay Eng

HIGH COURT (KUALA LUMPUR) – SUIT NO C22-185-86
GUNN CHIT TUAN J
21 MARCH 1989

Copyright – Passing-off – Whether defendant in breach of plaintiffs' copyright in musical works – Use by plaintiffs of stickers bearing watermarks on genuine cassettes – Anton Piller order

The plaintiffs were engaged in the making, production and publication of musical works and sound recordings and had the copyright in the musical works and sound recordings in question. The plaintiffs alleged that the defendant, the sole proprietor of Syarikat Oscar Records and Tapes, which sold musical works and sound recordings in cassette and other forms, had: (i)infringed the plaintiffs' said copyright in the musical works; (ii) passed off the musical works not of the plaintiffs' manufacture as and for that of the plaintiffs; (iii) reproduced and/or disposed of unlawfully, without the plaintiffs' licence or consent, the plaintiffs' said musical works in cassettes or any other material form; (iv) caused, enabled or assisted others to reproduce and/or dispose of unlawfully, the plaintiffs' said musical works without the plaintiffs' consent and (v) converted to and for his own use and purpose, the plaintiffs' said musical works. The plaintiffs also sought (i) an order for the delivery up to them of, inter alia, all the infringing copies of the said musical works in the form of musical cassettes and (ii) an inquiry as to damages or an account of profits and payment of all sums found due with interest thereon.

The plaintiffs' witness had purchased some of the infringing musical works from the defendant's shop, some of which had security stickers on which there were no watermarks and others which had very poorly printed labels. The plaintiffs then served an Anton Piller order on the defendant.

Held, granting the plaintiffs' application for an injunction:

(1) The plaintiffs had proved on the balance of probabilities that the cassettes were not manufactured by the plaintiffs.